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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

EDWIN L. EVANS et al., Plaintiffs, Cross-defendants and Appellants. v. B.J.B. A CALIFORNIA LIMITED PARTNERSHIP et al., Defendants, Cross-complaints and Respondents.	E032367 (Super.Ct.No. SCV 06305/12283) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Christopher J. Warner, Judge. Affirmed.

Brunick, Battersby, McElhaney & Beckett, William J. Brunick and Steven M. Kennedy, for Plaintiffs, Cross-defendants and Appellants.

Fullerton, Lemann, Schaefer & Dominick, and Michael R. Schaefer for Defendants, Cross-complainants and Respondents.

This case was previously before this court in case number(s) E024886 and E024887. In those consolidated appeals, we reviewed a trial court judgment adjudicating roadway rights, water rights, and claims of an easement for a water pipeline. In an

unpublished decision filed on December 14, 2000, we upheld the trial court's decision as to the roadway rights, but reversed and remanded for a new trial on the water rights and easement issues.

Cross-complainants and respondents B.J.B., a partnership, Barbara J. Bonadiman, and William W. Bonadiman, as trustees of the Joseph E. Bonadiman Trust, Joseph C. Bonadiman and William W. Bonadiman, as executors of the estate of Joseph E. Bonadiman, and Joseph C. Bonadiman (collectively, the Bonadimans), are the owners of certain property in the Verdemont area north of San Bernardino, in the historic Rancho Muscupiabe. Cross-defendants and appellants Edwin L. Evans and Marlene Evans (the Evanses) also own a lot in the same area. The remaining dispute (i.e., aside from the judgment as to the roadway rights) revolves around an historic pipeline carrying water from Cable Creek in the area. The pipeline traverses the Bonadimans' property, as well as the property of others. At the time the Evanses purchased their lot, the water pipeline was in serious disrepair. The Evanses repaired parts of the pipeline, and used it, in addition to horizontal wells on their property, to convey water to their land. The Evanses claimed an easement for the water pipeline; the Bonadimans countered with a claim for declaratory relief, that the Evanses had no rights to use the Cable Creek water or the pipeline. The Bonadimans' cross-complaint alleged an additional cause of action for trespass, arising out of an occasion when the Evanses entered onto the Bonadimans' land to excavate and repair a portion of the pipeline.

After the first trial, the court gave judgment for the Evanses, declaring that they possessed riparian and appropriative water rights, and finding that they had an easement by prescription, an easement by estoppel, and an implied easement for the water pipeline; it was this judgment that we reversed on the first appeal.

Upon remand, the trial court granted the Bonadimans' motion for summary adjudication of issues, to the effect that the Evanses had no right to the pipeline or the Cable Creek water. The Bonadimans dismissed their trespass claim. At the time the Bonadimans dismissed the trespass cause of action, the Evanses had requested a continuance to await an administrative decision on their previously dormant application for appropriative water rights. When the Bonadimans dismissed the remaining trespass cause of action, the trial court deemed the motion for continuance moot, and gave judgment for the Bonadimans.

The Evanses have appealed. They contend (1) the court erred in granting the Bonadimans' motion for summary adjudication on the water rights and easement issues, (2) the court erred in failing to grant the Evanses' motion for a continuance, and (3) the judgment the court did enter was erroneous, because it included rulings as to parcels, parties and issues which were not properly before the court.

FACTS AND PROCEDURAL HISTORY

The First Trial and Appeal

The Evanses brought an action to quiet title to an easement over the Bonadimans' property for the water pipeline. The pipeline has apparently been in existence since

possibly the late nineteenth or early twentieth century, though it had fallen into serious disrepair at the time the Evanses purchased their land.

The Evanses tried the first action on theories that they had an easement by prescription, an easement by estoppel, or an implied easement for the water pipeline. The trial court also determined that the Evanses had riparian rights and pre-1914 appropriative rights to the waters of Cable Creek, which are conveyed in the pipeline to the Evanses' property.

The Bonadimans moved for a new trial; the trial court denied the motion. The Bonadimans then appealed. This court reversed the judgment in favor of the Evanses on the water and pipeline issues. The sole theory presented to support the claim of riparian rights was that the pipeline constituted an artificial watercourse, which had taken the place of a natural watercourse, to which the Evans property was riparian. We rejected that claim, finding that the pipeline was not the equivalent of a natural watercourse. The Evans lot did not abut Cable Creek, and the pipeline did not follow the Cable Creek watercourse. We ruled, therefore, that the Evanses had no riparian rights to the waters of Cable Creek under that theory.

We likewise found that the Evanses had failed to prove they had any existing pre-1914 appropriative rights, and that any possible pre-1914 appropriative rights had been lost by disuse. Finally, we determined that the Evanses had introduced no evidence they had established a post-1914 appropriative right. Though they had filed an application with the relevant agency for an appropriation of water, their application had never been

acted upon; indeed, the agency had declared the water basin fully appropriated at that time.

Under any of the theories tried, therefore, the Evanses had failed to prove they had any water rights. In the absence of any right to the water from Cable Creek, they had no right to an easement for a pipeline to deliver Cable Creek water to their property. We accordingly held that the trial court should have granted the Bonadimans' motion for new trial as to the water and pipeline issues, and remanded the matter for further proceedings.

Remanded Proceedings in the Trial Court

Upon remand, the relevant remaining claims were the Evanses' complaint for quiet title to the pipeline easement, and the Bonadimans' cross-complaint for declaratory relief, whether the Evanses had any rights to use the pipeline water, and the additional cause of action for trespass.

The matter was assigned to a different judge upon remand. The Bonadimans moved for summary adjudication of issues as to the Evanses' quiet title claim, and the cross-complaint's declaratory relief cause of action. The Bonadimans argued, upon the bases suggested in our earlier opinion, that the Evanses had no "artificial watercourse" riparian rights, no pre-1914 appropriative rights, and no post-1914 appropriative rights to the Cable Creek water.

The Evanses opposed the motion for summary adjudication, for the first time asserting a new theory of the case. The Evanses effectively conceded the "artificial watercourse" riparian rights, and pre-1914 and post-1914 appropriative rights (except as

to possible new activity on the Evanses' application for a post-1914 appropriative right, as discussed later) issues, but now argued there was a triable issue of fact whether they had received, as part and parcel of the title to their property, a non-contiguous riparian right to Cable Creek water.

In support of their new riparian right claim, the Evanses appended the declaration of their expert witness, Robert C. Wagner, which stated that certain "documents would indicate that Cable Creek flowed through or was contiguous to the Muscupiabe Rancho [the original name of the large tract of which the Evans and Bonadiman properties were once a part] and that the Meyer and Barclay subdivision [i.e., the same area as subdivided by later owners] was also riparian to Cable Creek." The expert was "currently investigating if the riparian water rights to Cable Creek or Cable Canyon were preserved in the deeds conveying the property to Evans." This was the total extent of the evidence offered on the issue of non-contiguous riparian rights.

The trial court ruled that, on the basis of this showing, the evidence was wholly insufficient to establish any riparian right in the Evanses to Cable Creek water, and granted summary adjudication of issues in favor of the Bonadimans.

The Evanses moved for reconsideration of the ruling on the motion for summary adjudication of issues. At that time, they presented a new declaration from their expert, finally analyzing several chain of title documents, and suggesting that those documents showed "that the Evans parcel, within the Mary Meyer Subdivision, though no longer contiguous to Cable Creek can still be considered riparian to Cable Creek by virtue of the

reservation of the water right in the deeds transferring the lands from John Hancock [to] Julius Meyer and F.H. Barclay and subsequently to Mary Meyer and then to Robert B. Meyer."

The Bonadimans opposed the motion for reconsideration. The court granted reconsideration, but reaffirmed its substantive ruling on the motion for summary adjudication of issues. The court "reaffirm[ed] [its] previous holding, based on the *Rancho Santa Margarita v. Vail*,[**1**] case and further based upon [a] 1946 deed, which does not convey, in any sense, any water rights. We know from the law . . . that there is a difference between . . . what results from partition and what is granted. In this case, we are dealing with grants and the 1946 deed does not purport to grant any water rights and therefore water rights do not pass under the terms of the deed, which is actually a conveyance by gift . . . ."

After the ruling on the motion for summary adjudication of issues, only the trespass cause of action remained. While the remaining cause of action was pending, the Evanses moved for a continuance of the trial to await further administrative proceedings by the state water resources control board (the water board). The Evanses filed documents which indicated the water board was reconsidering its earlier declaration that all the Santa Ana River watershed was fully appropriated. The Evanses alleged that the water board might also consider and begin processing their earlier (1988) application for

post-1914 appropriative water rights. The Evanses therefore sought a continuance of the trial proceedings to await the water board's decision on their appropriative rights application. The Evanses apparently hoped that, if the water board finally approved their application for a post-1914 appropriative water right, they might then be able to assert an easement for the pipeline.

The Bonadimans responded by dismissing the trespass cause of action. They argued that dismissal of the sole remaining cause of action rendered the continuance request moot. The trial court agreed, holding the continuance application moot, and granted judgment for the Bonadimans.

The Evanses objected to the judgment prepared by the Bonadimans' counsel, on grounds that the proposed document did not accurately reflect the trial court's ruling with respect to the post-1914 appropriative rights, did not properly recite the trial court's pronouncements on the ripeness of the easement claim, and improperly included a claim for costs which the trial court had not awarded.

The Bonadimans submitted a proposed amended judgment. The Evanses again objected, specifically complaining that the proposed amended judgment purported to decide that the Evanses had no easement rights as to any of the parcels of property over which the pipeline passed, notwithstanding that the owners of a number of those parcels

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[footnote continued from previous page]

1 *Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501.

had not appealed defaults the Evanses had taken against them. The trial court signed the amended judgment, holding that the Evanses had no riparian rights to Cable Creek water, no pre-1914 appropriative rights to Cable Creek water, and "as of the date of this judgment," no post-1914 appropriative rights to Cable Creek water. The judgment also denied the Evanses "any easement rights . . . for water pipelines over" any of the real property parcels for which the Evanses had sought such easement rights, including properties not owned by the Bonadimans.

The Evanses have appealed from the amended judgment.

ANALYSIS

I. The Court Properly Granted Summary Adjudication of Issues on the Non-contiguous Riparian Right Theory

We address first the matter of the water and easement issues. The trial court granted the Bonadimans' motion for summary adjudication of those issues.

A. Standard of Review

Because granting or denying a motion for summary judgment or summary adjudication of issues involves pure questions of law, we review the record independently.[2]

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[2] *Ojavan Investors, Inc. v. California Coastal Com*. (1997) 54 Cal.App.4th 373, 385; *Wilkins v. National Broadcasting Co*. (1999) 71 Cal.App.4th 1066, 1074.

"As a summary judgment motion raises only questions of law regarding the construction and effect of supporting and opposing papers, this court independently applies the same three-step analysis required of the trial court. We identify issues framed by the pleadings; determine whether the moving party's showing established facts that negate the opponent's claim and justify a judgment in the moving party's favor; and if it does, we finally determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citations.]"[3] The same standard applies to summary adjudication of issues.[4]

B. Step One -- Issues Tendered by the Pleadings

The Evanses' complaint claimed the right to an easement for the water pipeline, from the headworks in Cable Creek, over the intervening lands to the Evanses' lot. The Bonadimans' cross-complaint sought a declaration of rights, that the Evanses had no rights to take the water from Cable Creek. Necessarily, the declaratory relief cause of action implied that the Evanses had no riparian rights to Cable Creek water, no pre-1914 appropriative rights, and no post-1914 appropriative rights.

The first trial was tried on the theory, among others, that the Evanses had a "riparian" right to the pipeline water. The Evanses argued that the pipeline itself should

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[3] *Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342.

[4] *Ojavan Investors, Inc. v. California Coastal Com.*, *supra*, 54 Cal.App.4th 373, 385, footnote 9; see also *Casey v. Overhead Door Corp*. (1999) 74 Cal.App.4th 112, 118.

be treated as a natural watercourse, although it was of artificial origin. The pipeline passed over the Evanses' land, and the Evanses argued, therefore, that their property was "riparian," not to Cable Creek, but to the pipeline. On the first appeal, this court determined that the pipeline could not be considered a substitute for a natural watercourse, and that the Evanses could have no "riparian" rights under the theory advanced.

The Evanses also argued at the first trial that they had succeeded to pre-1914 appropriative water rights. On appeal, this court determined that the existence of such a pre-1914 appropriative right had not been proven, and, even if it had, any such right had long been lost through disuse. We noted, among other things, that the Evanses had failed to prove that any pipeline water had ever been beneficially used on the land before they purchased it.

As to post-1914 appropriative rights, the evidence at the first trial established that, although the Evanses had made an application with the water board for such an appropriation, their application had never been granted. At the time of the first trial, the evidence also showed that the water board considered all the Santa Ana River basin water fully appropriated, and was not processing applications for further appropriations. Thus, the Evanses had failed to prove they had any right to a post-1914 water appropriation.

In the absence of any water rights under any theory proposed, we determined that the Evanses could not establish a prescriptive right for the water pipeline; there would be no justification for burdening the intervening properties with an easement for the

pipeline, the sole purpose of which was to convey water from Cable Creek, in the absence of any right to the water itself.

After we reversed the earlier judgment and remanded the matter for a new trial on the water and easement issues, the Evanses for the first time advanced a new theory of water rights: they now claimed that, although their property no longer abutted the stream, they had succeeded to a non-contiguous riparian right to Cable Creek water, as part and parcel of their land. This new theory had never been addressed in the earlier trial and appeal; it is this question, therefore, which occupies our analysis of the summary adjudication motion.

C. Steps Two and Three -- Whether the Bonadimans Have Demonstrated a Right to Judgment in Their Favor, and Whether the Evanses Have Raised a Triable Issue of Fact

The Bonadimans' motion for summary adjudication of issues asserted that riparian rights pertain to property which abuts the stream, and alienation of a part of the land, which thereafter no longer abuts the stream, ordinarily severs the riparian right from the non-contiguous parcel.

The Evanses responded that, while ordinarily the transfer of a non-contiguous parcel will sever the riparian right, the riparian right may nonetheless still attach to the non-contiguous parcel if the parties to the transfer clearly intended that result. The Evanses argued that the documents in the chain of title to their property evidence such an intent, and that they therefore succeeded to a still-existing non-contiguous riparian right

to Cable Creek water. Thus, the Evanses argue, they have raised a "triable issue of fact" concerning the existence of a non-contiguous riparian right to Cable Creek water, which passed to them with title to their land.

1. No Truly Triable Issue of "Fact" Exists Where the Sole Factual Issue Is Presented on Undisputed Evidence

Generally, the intent of the parties to a transaction is a question of fact.[5] The intentions of the parties in entering into a transaction may be determined from such matters as the words used in any agreement, the surrounding circumstances under which the parties entered into the agreement, the object, nature and subject matter of the agreement, and the acts and conduct of the parties.[6] Again, these matters largely present issues of fact; "[b]ecause intent is rarely susceptible of direct proof, it may be inferred from all the facts and circumstances disclosed by the evidence."[7]

Nonetheless, where the facts, as such, are undisputed, we are confronted with a question of law.[8] Here, the Evanses have presented what documents they could find about early property transactions in the area. They argue that these documents bespeak an intent to retain non-contiguous riparian rights in the subdivided parcels of land, including their own. No independent witnesses to the transactions, some of which took

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[5] *Kolodge v. Boyd* (2001) 88 Cal.App.4th 349, 362.

[6] *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 474.

[7] *People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.

place in the 1800's, are available. The paucity of evidence, aside from the words of the documents themselves, renders the interpretation of that written documentary evidence a question of law. "'The interpretation of a written instrument presents a question of law for this court to determine anew.'"[9] Thus, although the Evanses assert that they have identified a triable issue of "fact" -- i.e., the parties' intent to pass a non-contiguous riparian right through the various real estate transactions -- all the evidence on the issue is undisputed, and thus actually presents a question of law, which may properly be resolved on a motion for summary adjudication of issues.[10]

The real question, then, is whether the documentary evidence shows that a non-contiguous riparian right was transmitted with the various transfers of the Evanses' land. We answer this question in the negative.

2. The History of Property Transfers Does Not Show an Intent to Retain Riparian Rights with the Evanses' Parcel

a. The Hancock Deed to Meyer and Barclay

[footnote continued from previous page]

[8] *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799.

[9] *Miscione v. Barton Development Co.* (1997) 52 Cal.App.4th 1320, 1325, quoting *Klingele v. Engelman* (1987) 192 Cal.App.3d 1482, 1485.

[10] *Davis v. Consolidated Freightways* (1994) 29 Cal.App.4th 354, 366 ["If the facts are undisputed . . . and admit of only one conclusion, then summary judgment may be entered on issues that otherwise would have been submitted to the jury. That is the function of summary judgment proceedings"].

The parties appear to agree and accept that John Hancock was the record owner of a tract of Rancho Muscupiabe land in 1882, including the properties now owned by the Bonadimans and by the Evanses. In 1882, John Hancock executed a deed to Julius Meyer and F.H. Barclay of all of the land he owned, excepting "a tract of one hundred acres, situate in the northwest corner of the tract heretofore described, now occupied by H.G. Cable." Hancock reserved "the right . . . to lay pipes for the purpose of conducting water across the lands hereinbefore described, wherever the same may be convenient, said pipes to be laid underground." In the earlier appeal, we determined that "[t]he Evanses' property is not located in the 100 acres reserved to Hancock."

The 1882 deed recited that "the interest hereby conveyed is conveyed . . . to Julius Meyer two-thirds and to F.H. Barclay one-third, *and that all water and water rights of [Hancock] from and including Cable Creek* (so called) to the eastern boundary of the tract conveyed, . . . [except] the spring and water on the one hundred acre tract hereinbefore reserved[,] are also conveyed hereby, the whole tract . . . being a portion of the Rancho Muscupiabe . . . ."

The 1882 deed was recorded on July 19, 1883.

We understand from the description of the property conveyed that the Rancho Muscupiabe property which Hancock sold to Meyer and Barclay was traversed by Cable Creek; that is, Cable Creek was riparian to the tract Meyer and Barclay had received.

"It is well settled that the extent of lands having riparian status is determined by 3 criteria: [¶] 1. The land in question must be contiguous to or about on the stream, except

in certain cases . . . . [I]t is access to the stream, and not whether all surface drainage from the area in question drains directly into the stream at the point of access, that determines the riparian status of the land. . . . [¶] 2. The riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner. . . . [¶] 3. The land, in order to be riparian, must be within the watershed of the stream."[11]

Clearly, Meyer and Barclay received the entire tract in a single grant. The property they received, as a whole, was contiguous to and within the watershed of Cable Creek. The deed mentioned the creek by name. The evidence is reasonably susceptible of only one conclusion: that Hancock intended to convey, and did convey, to Meyer and Barclay all the water rights, including the riparian rights to Cable Creek, of the property he transferred to them.

We do not mean by this to imply that an express transfer of water rights is necessary to convey riparian rights with transferred property. Riparian rights are not an easement or appurtenance of the land past which the stream flows; rather, the riparian rights are considered part and parcel of the land itself.[12] Thus, it has been stated, the

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[11] *Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d 501, 528-529.

[12] *Lux v. Haggin* (1886) 69 Cal. 255, 390, 391-392; *Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 65.

riparian rights in a riparian tract of land (and not subdivided) pass with the transfer of the land, even when the deed is silent on the issue of riparian rights.[13]

We caution that the automatic transfer of riparian rights must not, however, be considered a hard-and-fast rule. The surrounding circumstances may lead to the conclusion that a deed, on its face purporting to grant a fee title and silent on the issue of riparian rights, was nevertheless not intended to convey riparian rights. In *Murphy Slough Assn. v. Avila*,[14] riparian property owners had conveyed a 100-foot strip of land adjacent to and paralleling the watercourse, for the purpose of forming a reclamation district. Even though the grant of the waterside property to the reclamation district was in the form of a deed conveying a fee interest, the surrounding circumstances showed that it was actually intended to convey a perpetual right-of-way, so the district could perform its reclamation functions. Despite the general rule that a fee grant of land contiguous to the watercourse, which is silent on the issue of riparian rights, would convey the riparian rights to the grantee, the *Murphy Slough* court determined that, "it would be absurd to conclude that riparian rights to the 100-foot strip were conveyed to the grantee, a reclamation district which had no power or authority to administer water rights for the

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[13] See *San Francisco v. County of Alameda* (1936) 5 Cal.2d 243, 246; *Miller & Lux Inc. v. J. G. James Co*. (1919) 179 Cal. 689, 691.

[14] *Murphy Slough Assn. v. Avila* (1972) 27 Cal.App.3d 649.

benefit of its members."[15] The conveyance of the 100-foot strip did not sever the riparian rights from the technically no-longer-contiguous parcels.

In any event, the Hancock conveyance to Meyer and Barclay did expressly mention the riparian rights to Cable Creek water. As to the land received as a single parcel, therefore, that large tract of land conveyed to Meyer and Barclay must be considered to have received riparian rights to Cable Creek water.

b. The Meyer and Barclay Subdivision

After they received the property from Hancock, Meyer and Barclay subdivided the tract into several large lots. Instead of sharing a proportionate interest in all of the lots, they exchanged the lots between them, assigning two-thirds to Meyer, and one-third to Barclay. The deed from Barclay to Meyer recited that Meyer was to receive lots 1, 3, 5, 6, 8, 9, 10, 12, 14, 16, 17, 18, and part of lot 13, "[t]ogether with two-thirds of all the water rights purchased from John Hancock with such land as well as two-thirds of all other waters and water rights acquired by the parties hereto which may be used upon said lands or any part thereof . . . ." Barclay granted to Meyer the "right of way for ditches, flumes and pipes across Lots 2, 4, 7, 11, 13, 15 and 19," -- that is, across the lots to which Barclay took title -- "and also two-thirds of all reservoirs, flumes and ditches already constructed on said land and in cañons opening on or toward said lands."

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[15] *Murphy Slough Assn. v. Avila*, *supra*, 27 Cal.App.3d 649, 656.

The Evanses asserted, and we accepted as true in the earlier appeal, that the deed from Meyer to Barclay granted an identical right-of-way to Barclay across Meyer's lots for "ditches, flumes and pipes."

The subdivision and exchange of lots created what became known as the Meyer and Barclay subdivision. The property to which the Evanses succeeded had originally been a part of Meyer's lot 16. Meyer lot 16 does not abut Cable Creek. The question therefore arises whether, as a result of the subdivision and exchange of lots, lot 16 in particular remained vested with riparian rights to Cable Creek.

In contrast to the rule, as we have previously indicated, that conveyance of riparian property conveys the riparian right when the grant deed is silent on the issue of water rights, the rule is otherwise when the riparian owner subdivides and sells off a portion of the riparian tract which is not contiguous to the stream. "[W]here the owner of a riparian tract conveys away a noncontiguous portion of the tract by a deed that is silent as to riparian rights," it is equally well settled that "the conveyed parcel is forever deprived of its riparian status."[16] "Land thus conveyed and severed from the stream can never regain the riparian right, although it may thereafter be reconveyed to the person who owns the part abutting on the stream, so that the two tracts are again held in one

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[16] *Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d 501, 538, citing *Anaheim Union Water Co. v. Fuller* (1907) 150 Cal. 327, 331.

ownership."[17] "A subsequent conveyance by one of the original owners, of a part of the tract not abutting upon the creek, would not carry any riparian or other right in the creek, unless it was so provided in the conveyance, or unless the circumstances were such as to show that parties so intended, or were such as to raise an estoppel."[18]

The intent of the parties is the key. Thus, where a parcel is severed from the stream, but the conveyance expressly declares that riparian rights are nevertheless transferred with the property, riparian rights may continue as "parcel of" the property, even though it is no longer contiguous to the watercourse. The Evanses claim that the deeds creating the Meyer and Barclay subdivision are just such express declarations that the riparian rights would continue with each of the subdivided lots. We cannot be so sanguine about the retention of riparian rights equally for all of the subdivided lots.

First, the physical facts are significant: some of the lots did become separated by the subdivision from contiguity to the stream. Under the ordinary rule, as we have explained, that separation would operate to sever the riparian rights from those lots. Other lots remained contiguous to Cable Creek. The deeds between Meyer and Barclay did expressly mention water rights, but did not make explicit that riparian water rights were intended to attach to each and every subdivided lot.

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[17] *Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 331.
[18] *Hudson v. Daily* (1909) 156 Cal. 617, 624.

This brings us to the second point: the deeds did not carefully distinguish between the sources of the water rights intended to be used on the various properties. They simply declared that two-thirds of the rights would be assigned to Meyer and one-third to Barclay. This included any water rights Meyer and Barclay had received from Hancock, which may have included both riparian and appropriative rights. It also included any water rights independently established or acquired by either Meyer or Barclay.

As we noted in the earlier appeal, there was such a separately established appropriative right. Julius Meyer had recorded a notice of appropriation in 1883 for 1000 miner's inches of water from Cable Creek. The appropriative right was recorded May 18, 1883, and the exchange deed from Barclay to Meyer was recorded later, on December 13, 1883. To the extent Meyer had ever exercised this appropriative right, therefore, the deed undoubtedly covered the right, and assigned one-third of its water to Barclay and two-thirds to Meyer.

The recorded appropriation took the water for use on 3000 acres of the Rancho Muscupiabe. Clearly, therefore, not all water Meyer took from Cable Creek was taken as a riparian user; at least some of the water purported to be taken under an appropriative right. The application of the appropriative right to 3000 acres of the Rancho Muscupiabe does not tell us, however, where the appropriated water was intended to be used. Presumably, the appropriative right was intended to be used on some of the lots Meyer had received in the exchange with Barclay.

Although an owner of property abutting a watercourse may have both riparian and appropriative rights,[19] the uses to which each is put may be different. "'The riparian doctrine confers upon the owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land. The appropriation doctrine contemplates the diversion of water and applies to "any taking of water for *other than riparian* or overlying *uses*."'"[20] The "devotion [of water] to a public use or exportation beyond the basin or watershed," for example, are not riparian uses. Similarly, "[t]he seasonal storage of water is a nonriparian use."[21] The diversion of water to lots distant from the stream, and the use of such water for storage purposes, would tend to indicate that the use was appropriative, rather than riparian.

As the deeds between Meyer and Barclay made clear, each was receiving not only riparian rights, but also appropriative rights, to Cable Creek water. Because appropriative, as well as riparian, rights were being exchanged, it was not necessarily the case that riparian rights would be needed to bring water to the non-contiguous subdivision lots. Thus, the mention in the exchange deeds of water rights, including

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[19] *Pleasant Valley Canal Co. v. Borror* (1998) 61 Cal.App.4th 742, 774 ["'It is established in California that a person may be possessed of rights as to the use of the waters in a stream both because of the riparian character of the land owned by him and also as an appropriator'"].

[20] *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441, italics added, quoting *People v. Shirokow* (1980) 26 Cal.3d 301, 307, and *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925.

[21] *Pleasant Valley Canal Co. v. Borror*, *supra*, 61 Cal.App.4th 742, 775.

riparian rights, did not necessarily evidence an intent that each of the lots would expressly retain its riparian status.

Third, the separate alienation of one-third of the water rights to Barclay also of necessity diminished whatever riparian rights Meyer retained in his lots. "Riparian rights may be severed from land by grant, condemnation, or by prescription."[22] Thus, conveyance of one-third of the rights to Barclay worked a reduction of whatever riparian rights Meyer had retained.

Fourth, no evidence established when, by whom, or for what purpose the historic pipeline was created. There is no necessity that the pipeline was constructed to carry riparian water for riparian purposes to riparian land. There was no proof that Meyer constructed the pipeline. Even if it is assumed that Meyer built the pipeline, there was no proof that it was not intended to carry appropriative water. There was no evidence to show what beneficial use, either riparian or appropriative, to which the pipeline water was ever put, whether on Meyer lot 16 or elsewhere. Even if it could be shown, therefore, that lot 16 could be considered to have been still riparian to Cable Creek, there was no connection in the evidence between its riparian status and the water carried in the pipeline. The existence, if any, of riparian water rights did not, of necessity, prove any right to use the pipeline.

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[22] *Carlsbad etc. Co. v. San Luis Rey etc. Co*. (1947) 78 Cal.App.2d 900, 913.

At best, the evidence concerning the Meyer and Barclay subdivision showed that Meyer might have retained a two-thirds riparian right as to all the lands transferred to him; even so, nothing showed that the pipeline existed at that time, or was in any way connected to an exercise of the riparian right.

c. The Transfer to Mary Meyer

According to Wagner, the Evanses' expert, Julius Meyer transferred lot 16 of the Meyer and Barclay subdivision to Mary Meyer on March 26, 1887. The copy of the deed included in the documents attached to Wagner's declaration is of such poor quality as to be virtually illegible. We nonetheless accept Wagner's representations that the 1887 deed transferred lot 16, and other lands, to Mary Meyer, with "water rights," though the water rights are at one place in the deed described as "appurtenant to said land," [i.e., indicative of an appropriative right] and the nature of the water rights mentioned remains unclear.

d. Mary Meyer Subdivision, and Transfer to Robert Meyer

Mary Meyer further subdivided lot 16 of the Meyer and Barclay subdivision into lettered lots A, B, C, D, E, F, G and H. In 1893, she transferred "Lot C Block 16," among other parcels, to Robert Meyer for one dollar, "together with a 1/5 interest in the water deeded by Julius Meyer to Mary Meyer."

The same problems with respect to the Meyer and Barclay subdivision reappear in the Mary Meyer subdivision. Even if lot 16 of the Meyer and Barclay subdivision could be considered to have retained a reduced riparian right, the further subdivision of lot 16

(Block 16) into smaller lots, which were, of necessity, removed from contiguity to the stream, worked a severance of the riparian right, which would remain with the "riparian" land Mary Meyer retained. The severance would be effected, unless the deed to Robert Meyer or the surrounding circumstances evidenced a contrary intent.

Again, although the 1893 deed to Robert Meyer refers to "the water," it is unclear precisely what is meant by that reference. While it might refer to riparian rights, it might also refer to appropriative water rights. Even if we assume that riparian rights were intended, the right that Robert Meyer received was undeniably reduced: at most, he received only one-fifth of a two-thirds right, or a two-fifteenths right.

Similarly, even if a two-fifteenths riparian right remained with lot C, which Robert Meyer received from Mary Meyer, no evidence showed when, by whom, or for what purpose the water pipeline had been constructed. There was no evidence as to the nature of the water conveyed in the pipeline, nor where or to what beneficial uses the pipeline water had been put.

e. Later Lot C Transfers

Wagner's declaration avers that lot C, a subdivision of former lot 16 of the Meyer and Barclay subdivision, "was subsequently transferred without further subdivision from Robert B. and Bertha Meyer to Edward B. Meyer, Raymond J. Meyer, and Alma Meyer-Heap, [on] February 15, 1946 and to the Meyer Family Ranching Company, February 27, 1946; then to John and Jessie Shinn, December 28, 1955; then to George and Lilla [*sic*

Lilia A.] Voss, September 16, 1958; and to Joseph E. Bonadiman as Trustee, April 6, 1971 . . . ."

The deeds show the transfer of lot C, as described, except for the Shinn deeds to the Vosses.

The Shinn deeds upon which the Evanses relied are interesting, as the Bonadimans pointed out below, because they are quitclaim deeds; the Evanses did not produce, in support of their motion for reconsideration, the *grant* deed from the Shinns to the Vosses. The Bonadimans supplied that omission in their opposition to the motion for reconsideration. The grant deed shows the conveyance of lot C to the Vosses on September 5, 1958.

The Evanses make much of the quitclaim deeds from the Shinns to the Vosses, because the quitclaim deeds, unlike the grant deed, quitclaim to the Vosses "all water rights, rights of way and other appurtenances relating to said land . . . and all right, title and interest in any other lands from which water is obtained, developed or diverted for use on the tracts above referred to, together with pipe lines and rights of way therefor used in the transportation of such water."

The Bonadimans asserted below that the mention of water rights in the quitclaim deeds undercuts, rather than reinforces, the notion that water rights, including riparian rights, were intended to be conveyed in the grant deed. We agree with this proposition. "A quitclaim deed is used when the grantor intends to convey such an interest in the property as he or she has, in contradistinction to other deeds which grant fee or other

estate with warranty of title."[23] The express transfer of water rights by quitclaim deed, and not by grant deed, demonstrates that no title to water rights, including riparian rights, was intended to be warranted in the grant deed.

The Evanses failed to produce or mention the grant deed, but attached only the quitclaim deeds to their motion for reconsideration. This failure is troubling with respect to the analysis and opinion of the Evanses' expert, and bespeaks carelessness, at best, or disingenuousness, at worst.

Setting aside these difficulties, however, the documentary evidence might be construed to show that lot C may have retained, at most, a two-fifteenths riparian right up through the transfer to Joseph E. Bonadiman, as Trustee, in 1971.

f. Transfer to the Evanses

The next transfer in the chain of title is that from the Bonadimans to the Evanses. The Evanses' expert declares, on this point, that "*[t]he Evans parcel was subsequently created out of Lot C*." (Italics added.) This casual admission, as to which the expert devoted no further analysis, is fatal to the Evanses' claim of riparian rights.

The maps prepared by the expert demonstrate beyond cavil that the Evanses' property does not encompass the whole of lot C; rather, it is a smaller sub-unit of Mary Meyer subdivision lot C. As indicated in our earlier opinion, the Bonadimans had further subdivided some of the lands they owned in the area: "By Parcel Map 3540, [the

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[23] *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 503.

Bonadimans] created four lots in a portion of former Meyer and Barclay subdivision lot 16." Parcel 3 of the lots created by the Bonadiman subdivision was the property the Bonadimans eventually sold to the Evanses.

The Bonadimans sold parcel 3 to the Evanses in 1977. Strictly speaking, the transfer was to El-Co Corporation, Edwin Evans's pipe contractor business. El-Co further subdivided parcel 3 into two smaller lots, by Parcel Map 4364, and later transferred both parts to Evans in 1979. Edwin Evans later married Marlene Evans.

In any event, none of the grant deeds to El-Co or to Evans made any mention whatever of any water rights. At the time of the last subdivisions, therefore, when the Bonadimans recorded Parcel Map 3540 and sold parcel 3, that parcel became severed from whatever riparian right may have remained. Parcel 3 did not abut the stream to which any conceivable riparian right would relate. There was no historic use of riparian waters of any kind on parcel 3, which would evidence any intent to retain a riparian right with parcel 3. It had no access to the stream. The only conceivable source of riparian water is the pipeline. Even if it is assumed, however, that the pipeline carried riparian water from Cable Creek, that water was never used, so far as the evidence shows, on the Evanses' parcel. No facilities existed on the Evanses' land at the time of purchase which would be suitable for taking water from the pipeline for use there. The pipeline did not then deliver water to the Evans property, but actually conveyed water to downstream properties. Under the circumstances, therefore, we can glean no intent upon the subdivision of parcel 3 to maintain it as riparian land.

Presuming that lot C retained any riparian character at all -- a dubious point at best -- even that minuscule two-fifteenths interest was lost once parcel 3 was severed from lot C.

El-Co's further subdivision of parcel 3 into two smaller lots also defeats the claim that riparian rights, if any, attached to all of parcel 3.

We, like the trial court, advert to the key case of *Rancho Santa Margarita v. Vail*, *supra*. There, the California Supreme Court explained the theory behind severance of riparian rights, where a grant deed is silent on the issue of riparian rights: "In a grant, the grantor has title to the land subject to the grant. The proposed grantee has nothing, and therefore the grantee secures only such title as is granted. When the grant is silent as to riparian rights obviously such rights have not been conveyed and remain with the grantor for the benefit of [the] retained lands and for the benefit of other riparians. If the grant deed conveys the riparian rights to the noncontiguous parcel, that parcel retains its riparian status."[24]

The Evanses' argument depends entirely upon the supposed retention of the riparian right in the grants from Hancock to Meyer and Barclay, to Julius Meyer, to Mary Meyer, and to Robert Meyer. The Evanses place great reliance on *Strong v. Baldwin*[25] for the thesis that a "riparian right . . . preserved in a parcel of detached land passes in all

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[24] *Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d 501, 538-539.
[25] *Strong v. Baldwin* (1908) 154 Cal. 150.

subsequent conveyances of that land unless said conveyances expressly state otherwise," citing *Strong v. Baldwin* at page 157.[26] *Strong* is merely another instance of the principle that, where riparian rights exist, they are considered "parcel of" the land, and need not be expressly mentioned in a deed when a tract of riparian land is conveyed to a new owner.[27] Many of the transactions at issue here, however, do not involve conveyance of the whole of a tract of riparian land; rather, they involve subdivision of the land, as a result of which the subdivided parcel is no longer contiguous to the stream to which the original, larger parcel was riparian. The well-settled rule under those circumstances is that the subdivided, non-contiguous parcel is severed from the riparian right.[28] If the right becomes severed from a larger riparian parcel which remains contiguous to the stream, the result should be no different when the larger "riparian" parcel is itself no longer contiguous to the stream. The Evanses' reliance on *Strong v. Baldwin* is thus misplaced; the subsequent transfers of the non-contiguous riparian land did not involve subdivision, which would have worked a severance of the riparian right.

As noted, the Evanses' expert's opinion on the continuation of the non-contiguous riparian right consists almost solely of the statement that "the Evans parcel, within the

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[26] *Strong v. Baldwin*, *supra*, 154 Cal. 150, 157.

[27] See *Miller & Lux v. Madera Canal etc. Co.*, *supra*, 155 Cal. 59, 65; *Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 331; *Lux v. Haggin*, *supra*, 69 Cal. 255, 390, 391-392.

Mary Meyer Subdivision, though no longer contiguous to Cable Creek[,] *can still be considered riparian* to Cable Creek by virtue of the reservation of the water right in the deeds transferring the lands from John Hancock[,] Julius Meyer and F.H. Barclay[,] and subsequently to Mary Meyer and then to Robert B. Meyer." (Italics added.)

The expert's "opinion" provides little illumination on the matters at issue. For one thing, it is hardly an opinion that the Evanses in fact did succeed to a surviving non-contiguous riparian right. The opinion is equivocal at best, suggesting that, if circumstances were favorable, the evidence *might* be taken to show that such a right existed.

More importantly, it conspicuously ignores the further subdivision of the lands by the Bonadimans. This omission is telling. When the Bonadimans sold parcel 3 to the Evanses, the grant deed was silent on the issue of water rights. Under the rule of *Rancho Santa Margarita v. Vail*, *supra*, whatever riparian right might still have existed remained with the Bonadimans' retained lands, and was not transferred to the Evanses.

The surrounding circumstances likewise do not reveal any intent to transfer riparian rights to the Evanses. The Evans property lies along a fault line where natural springs occur. The Evanses have developed the springs with horizontal wells, which

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28 *Rancho Santa Margarita v. Vail*, *supra*, 11 Cal.2d 501, 538-589; *Anaheim Union Water Co. v. Fuller*, *supra*, 150 Cal. 327, 331; *Orange County Water District v. City of Riverside* (1959) 173 Cal.App.2d 137, 163.

supply their home with domestic water. The pipeline did not historically serve the Evanses' land; the use of pipeline water on their land has only been developed since the Evanses purchased their property. The purposes to which the Evanses put the pipeline water are irrigation, which might be either a riparian or an appropriative use, and for storage of water in a pond on the property, a distinctly non-riparian use. All the circumstances point to the conclusion that the pipeline, which conveys water for use on properties at some distance from the stream, and for nonriparian uses, exercises either a prescriptive, an appropriative, or an unlawful use, and not a riparian right.

The Evanses contend that riparian rights, unlike appropriative rights, are not lost by nonuse. This proposition, as such, is correct;[29] however, we do not mean to indicate, by reference to the lack of historical use of Cable Creek water on the Evanses' property, that a riparian right has been lost by nonuse. Rather, we infer from the lack of historical use of the water on the property that no intent to retain riparian rights for use on lot 16 or lot C, or any further subdivision thereof, was ever made manifest.

Neither the evidence of the deeds themselves, nor the opinion of the Evanses' expert, was sufficient to show that the Evanses even arguably retained any kind of riparian right in the property they purchased from the Bonadimans. As a matter of law, therefore, the evidence adduced on the motion for summary adjudication admits of only

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[29] *Orange County Water District v. City of Riverside, supra,* 173 Cal.App.2d 137, 184.

one conclusion: the Evanses cannot prevail on a non-contiguous riparian right theory. Except as further discussed below, all the other theories of possible entitlement to pipeline water had been defeated. The trial court properly granted summary adjudication of issues against the Evanses on the water rights issues.

Similarly, as before, in the absence of any entitlement to water carried in the pipeline, the Evanses could not show that they had a right to burden the intervening properties with an easement for the pipeline, the sole purpose of which was to convey the water from Cable Creek. Summary adjudication on the pipeline easement issues was proper also.

II. The Trial Court Did Not Err in Failing to Grant a Continuance

After the trial court had granted summary adjudication of issues in favor of the Bonadimans and against the Evanses on the water rights and easement issues, the sole matter left to be tried was the Bonadimans' trespass cause of action. While that remaining cause of action was pending, the Evanses applied to the court for a continuance of the trial. Their basis for the request was that the water board might reconsider its declaration that waters in the Santa Ana River basin were fully appropriated. A new dam in the watershed might have changed conditions, such that some applicants might be able to apply for further water appropriations. The water board decided to reopen the question of the "fully appropriated" declaration, upon the application of some public water agencies.

The Evanses hoped that the water board would resume reviewing applications for post-1914 appropriative rights, including the application they had filed in 1988. They speculated that, *if* the water board reconsidered their application, and *if* the water board granted their application, *then* they would have a post-1914 appropriative water right which would support their claim for an easement for the water pipeline.

The trial court was not required to grant the Evanses' request for a continuance. First, as noted, the sole issue remaining to be tried was the trespass cause of action. The Evanses' application for a post-1914 appropriative right had nothing to do with the trespass issues. The Evanses' stated purpose for the continuance related to the easement issues, matters which had already been decided on the motion for summary adjudication. Once the Bonadimans dismissed the trespass cause of action, nothing remained to be tried. The trial court properly gave judgment for the Bonadimans; in the absence of any pending cause of action, the motion for a continuance was moot.

Even if the motion for a continuance was not moot, and even if we treat the trial court's ruling as a denial of the motion for a continuance, reversal is not required. The decision whether or not to grant a continuance is within the discretion of the trial court;[30]

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[30] *Lucas v. George T. R. Murai Farms, Inc*. (1993) 15 Cal.App.4th 1578, 1586.

its ruling will not be disturbed on appeal in the absence of a manifest abuse of that discretion.[31] The Evanses have not demonstrated any such abuse.

The Evanses failed to show good cause for a continuance. The sole basis of the request was speculative, that the water board might reopen the Santa Ana River watershed to further appropriation, that the water board might consider the Evanses' long-dormant application for an appropriative right, and that the water board might grant them such a right.

The Evanses further speculated about the effect of such an appropriative right, assuming the water board decided to grant their application -- the Evanses took the view that, if they obtained an appropriative right, then their right to an easement for the pipeline, which this court had held was defeated in the absence of any such right, would, like Athena from the brow of Zeus, spring full-grown into existence from oblivion. The Evanses misconceive the situation. Even if they are belatedly granted a post-1914 appropriative right, the state of the evidence as to the pipeline easement will not have changed, because the Evanses will have had no right to water during the prescriptive period for establishing a pipeline easement.

Moreover, there is no telling when, or if, the water board might decide the Evanses' application. The trial court did not abuse its discretion in refusing to continue

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[31] *Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984 ["A reviewing court may not disturb the exercise of discretion by a trial court in the absence of a clear abuse

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the trial, for a seemingly indefinite period, to await the speculative outcome of an administrative decision, which could have no effect on the issues remaining to be tried. The Evanses were not entitled to the continuance they requested.

III. There Is No Error in the Judgment for Which the Evanses Are Entitled to Reversal

The Evanses' final contention is that the judgment below was erroneous in several respects.

First, the Evanses assert that the judgment should have, but did not, refer to the road easement matter, which we affirmed in the earlier appeal. In the first trial, the road easement case and the water rights and pipeline case were consolidated. The consolidated case was assigned the case number of the first-filed action, the road case. Thus, the trial court's judgment below, with respect to the water and pipeline issues, bears the road case number. As the Bonadimans point out, however, there can be no mistake that this court affirmed the earlier judgment in the road case. It was not error for the court merely to fail to mention again the affirmed judgment in the road case.

Next, the Evanses complain that the court did not state its reasoning or intent in the judgment below. Specifically, the Evanses desired the judgment to recite that the judgment should not be taken by the water board as reflecting any decision on the merits of the Evanses' application for appropriative rights. They further sought to memorialize

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thereof appearing in the record"].

the trial court's remark that the issue of a pipeline easement was "not ripe at this juncture," because the Evanses had not yet proven they had a right to any water flowing through the pipeline.

We agree with the Bonadimans that these specific recitations were not required in the judgment, which properly disposes of the issues before the court; the absence of recitations on extraneous matters does not render the judgment "erroneous."

Finally, the Evanses argue that the judgment is erroneous because it is overbroad, affording more relief to the Bonadimans than that requested in the scope of their cross-complaint. The Evanses further complain that the judgment erroneously purports to declare that the Evanses have no right to a pipeline easement across any of the intervening properties, notwithstanding that the Evanses had taken default judgments against several of the owners of the intervening lots.

The Evanses first complain that the judgment should have been limited to a declaration concerning water rights, as pled in the Bonadimans' cross-complaint, and should not have addressed the pipeline issues. Not so. The Evanses' own complaint tendered the pipeline issues. Disposition of them in the judgment was proper.

The last point, that the trial court had "no authority" to "set aside the default judgments" the Evanses had obtained against other property owners, is likewise without merit.

The Evanses sought an easement for a pipeline which ran over the properties of several different owners. All the owners were served; only the Bonadimans, however,

answered and contested the matter. Upon the first trial, the court awarded the Evanses an easement for the entire length of the pipeline. Only the Bonadimans appealed. We reversed the trial court's judgment. Of necessity, the issues concerning the pipeline easement pertain to the entire pipeline, and apply equally along its entire length. The reversal of the judgment concerning the pipeline easement necessarily affected the right to the easement not only across the Bonadimans' properties, but also across any of the affected properties. Where the part of a judgment appealed is so intertwined with matters not appealed that the appeal affects the other parts, the appellate court may reverse the entire judgment if it is necessary to do justice.[32] The same principle applies here. Our earlier reversal of the judgment respecting the pipeline easement affected the easement over each and every intervening parcel, not simply the Bonadimans' lands. As the Bonadimans point out, there would be little point in burdening the other property owners with an easement for a pipeline, which ultimately could not be used because there was no easement across the Bonadimans' property.

In short, we find nothing in the judgment which requires reversal.

DISPOSITION

The judgment below is affirmed.

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[32] *Blache v. Blache* (1951) 37 Cal.2d 531, 538; *Eby v. Chaskin* (1996) 47 Cal.App.4th 1045, 1049.

/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P.J.

/s/ Gaut
J.